

This letter discusses possible sales tax, cigarette tax, and tobacco products tax consequences of selling tobacco products and cigarettes in Illinois from outside the State. See 35 ILCS 120/1 et seq. (This is a GIL).

March 7, 2002

Dear Xxxxx:

This letter is in response to your letter received January 2, 2002. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at <http://www.revenue.state.il.us/Laws/regs/part1200/>.

In your letter, you have stated and made inquiry as follows:

My name is PERSON President of COMPANY a California Corporation. We own several Web Sites and would like to sell Tobacco Products via the Internet to Consumers Nationwide including The State of Illinois.

I have a few questions that need to be answered from The Illinois Department of Revenue before I start offering our services to the Consumers of the State of Illinois.

I would like to know if there are any Tax liabilities within the Sate of Illinois if I sell Tobacco Products to Consumers from my business in the State of California.

I will be buying Tobacco Products from Manufactures who make Tobacco Products within the United States. Then I will be selling Tobacco Products to Consumers of The State of Illinois. Is there any problem or restrictions doing business in this manner?

Will I need any special Permit or License? What is the maximum allowance of Tobacco Products a Consumer can purchase from my Site for consumption purposes only who resides in The State of Illinois?

Is there anything else I need to know in regards to selling Tobacco Products to Consumers within The State of Illinois? I need to know if your State has any restrictions on certain types of Tobacco Products sold within the State.

I would like to know all the Tobacco liabilities within the Sate of Illinois if I decide to offer our services and sell Tobacco Products to the Consumers within the State?

I would appreciate your valued answers to my questions in a timely manner because this will help me decide if I am going to offer our services to the Consumers of The State of Illinois. **Please respond to this Correspondence in writing.

The Tobacco Products Tax Act of 1995 (Act) applies to sales of tobacco products. Under Section 10-10 of the Act, 35 ILCS 143/10-10, "a tax is imposed on any person engaged in business as a distributor of tobacco products, as defined in Section 10-5, at the rate of 18% of the wholesale price of tobacco products sold or otherwise disposed of to retailers or consumers located in this State."

"Tobacco products" "means any cigars; cheroots; stogies; periques; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff or snuff flour; cavendish; plug and twist tobacco; fine-cut and other chewing tobaccos; shorts; refuse scraps, clippings, cuttings, and sweeping of tobacco; and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking; but does not include cigarettes or tobacco purchased for the manufacture of cigarettes by cigarette distributors and manufacturers defined in the Cigarette Tax Act and persons who make, manufacture, or fabricate cigarettes as a part of a Correctional Industries program for sale to residents incarcerated in penal institutions or resident patients of a State operated mental health facility." 35 ILCS 143/10-5.

"Business" "means any trade, occupation, activity, or enterprise engaged in, at any location whatsoever, for the purpose of selling tobacco products." 35 ILCS 143/10-5.

"Distributor" "means any of the following:

- (1) Any manufacturer or wholesaler in this State engaged in the business of selling tobacco products who sells, exchanges, or distributes tobacco products to retailers or consumers in this State.
- (2) Any manufacturer or wholesaler engaged in the business of selling tobacco products from without this State who sells, exchanges, distributes, ships, or transports tobacco products to retailers or consumers located in this State, so long as that manufacturer or wholesaler has or maintains within this State, directly or by subsidiary, an office, sales house, or other place of business, or any agent or other representative operating within this State under the authority of the person or subsidiary, irrespective of whether the place of business or agent or other representative is located here permanently or temporarily.
- (3) Any retailer who receives tobacco products on which the tax has not been or will not be paid by another distributor.

"Distributor" "does not include any person, wherever resident or located, who makes, manufactures, or fabricates tobacco products as part of a Correctional Industries program for sale to residents incarcerated in penal institutions or resident patients of a State operated mental health facility.

It is unlawful for any person to engage in business as a distributor of tobacco products within the meaning of the Act without first having obtained a license to do so from the Department. Application for a license must be made to the Department in a form prescribed and furnished by the Department.

More information about the Tobacco Products Tax Act of 1995 is available on the Department's web site. There you can review statutes, regulations and forms that may be useful.

Persons who sell cigarettes as defined in Section 1 of the Cigarette Tax Act, 35 ILCS 130/1 may incur tax liability under the Cigarette Tax Act or the Cigarette Use Tax Act, 35 ILCS 135/1 et seq. "Cigarette" means "[a]ny roll for smoking made wholly or in part of tobacco irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, and the wrapper or cover of which is made of paper or any other substance or material except tobacco." The Cigarette Tax Act imposes a tax upon persons engaged in business as a retailer of cigarettes in this State at the rate of 58 cents per package of 20 cigarettes. See the Department's regulation at 86 Ill. Adm. Code 440.10, copy enclosed. The Cigarette Use Tax Act imposes a tax upon the privilege of using cigarettes in this State at the rate of 58 cents per package of 20 cigarettes. This Cigarette Use Tax must be collected by a distributor maintaining a place of business in this State or a distributor authorized by Section 7 of the Cigarette Use Tax Act to hold a permit to collect such tax. See 86 Ill. Adm. Code 450.10, enclosed.

Persons selling tangible personal property in Illinois must also consider their sales tax obligations. The following information outlines the principles of nexus. We hope it is helpful to you in determining whether you are responsible to pay tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(I), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis will trigger Use Tax collection responsibilities. Installation alone by a seller on a repetitive basis could be sufficient. Please refer to *Brown's Furniture, Inc. v. Zehnder*, (1996), 171 Ill.2d 410.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers'

Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The use Tax rate is 6.25%.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Martha P. Mote
Associate Counsel

MPM:msk